Petition

81-2035

NO.

Office - Supreme Court, U.S.
FILED
MAY 4 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOEL L. MERLING
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIAN W. SHAUGHNESSY,
Attorney for Joel L. Merling
1133 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 293-9390

QUESTIONS PRESENTED*

1. Whether petitioner was so mentally impaired at the time of his plea that he was incapable of understanding the charges and the guilty plea should have been withdrawn or, in the alternative, a hearing should have been held on this issue.

2. Whether the record establishes that petitioner understood the nature of the charges.

3. Whether there was a factual basis developed on the record sufficient to justify the acceptance of petitioner's guilty plea.

---

*There are no parties other than petitioner and the United States to the proceeding in the Court of Appeals for the Second Circuit.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	7
I. BECAUSE PETITIONER WAS SO MENTALLY IMPAIRED THAT HE WAS INCAPABLE OF UNDERSTANDING THE CHARGES, THE GUILTY PLEA SHOULD HAVE BEEN WITHDRAWN OR, IN THE ALTERNATIVE, A HEARING SHOULD HAVE BEEN HELD ON THIS ISSUE	7
II. THE RECORD FAILS TO ESTABLISH THAT PETITIONER UNDERSTOOD THE NATURE OF THE CHARGES	15
III. THERE WAS NO FACTUAL BASIS DEVELOPED ON THE RECORD TO JUSTIFY THE ACCEPTANCE OF PETITIONER'S GUILTY PLEA	16
CONCLUSION	19
APPENDIX A	1a
APPENDIX B	1b

TABLE OF AUTHORITIES

	Page
CONSTITUTIONAL PROVISIONS AND STATUTES:	
Amendment V	2
21 U.S.C. § 841	2
21 U.S.C. § 846	2
28 U.S.C. § 2255	2
CASES CITED:	
Brady v. *United States*, 397 U.S. 742 (1970)	7
Direct Sales v. *United States*, 319 U.S. 703 (1942)	17
Dusky v. *United States*, 362 U.S. 402 (1960)	8
Hayes v. *United States*, 305 F.2d 540 (8th Cir. 1962)	13
Irizarry v. *United States*, 508 F.2d, 960 (2d Cir. 1974)	15
Lamagna v. *United States*, 646 F.2d 775 (2d Cir. 1981)	18
Manley v. *United States*, 396 F.2d 699 (5th Cir. 1968)	12
McCarthy v. *United States*, 394, U.S. 459 (1969)	7
McMann v. *Richardson*, 397 U.S. 759 (1970)	7
North Carolina v. *Alford*, 400 U.S. 25 (1970)	7
Nelms v. *United States*, 318 F.2d 510 (4th Cir. 1963)	9
Osborne v. *Thompson*, 481 F.Supp. 162 (M.D.Tenn., 1979)	12
Rizzo v. *United States*, 516 F.2d 789 (2d Cir. 1975)	18
Sanders v. *United States*, 373 U.S. 1 (1963)	9
Santobello v. *New York*, 404 U.S. 257 (1971)	16
United States v. *Falcone*, 311 U.S. 205 (1940)	17
United States v. *Frady*, U.S. Sup. Ct. No. 80-1595, 31 CrL 3013, decided April 5, 1982	8
United States v. *Joslin*, 434 F.2d 526 (D.C. Cir. 1970)	8

United States v. *Kincaid*, 362 F.2d 939 (4th Cir. 1966) 12
United States v. *Malcolm*, 432 F.2d 809 (2d Cir. 1970) 9
United States v. *Masthers*, 539 F.2d 721 (D.C. Cir. 1976) 8
United States v. *McGirr*, 434 F.2d 844 (4th Cir. 1970) 8
United States v. *Perry*, 645 F.2d 38 (2d Cir. 1981) . 15
United States v. *Wetterlin*, 583 F.2d 346 (7th Cir. 1978) 16

FEDERAL RULES:
Fed. R. Crim. P. 11(c)(1) 8

MISCELLANEOUS:
"A Comparison of Cognitive Impairment Due to Benzodiazepines and to Narcotics," Nelson Hendler, M.S., M.D., *et al.*, *American Journal of Psychiatry*, 137:7, July 1980. 13
"Supreme Court's Cloak of Secrecy Becomes Issue in Rehnquist Issue," *National Law Journal*, 5:3, January 18, 1982. 12

NO.

IN THE

Supreme Court of the United States

JOEL L. MERLING
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Joel L. Merling, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on December 16, 1981.

OPINION BELOW

The opinion of the Court of Appeals was not reported, but is reprinted in full in Appendix A hereto. An unpublished Memorandum and Order of Decision was rendered by the District Court for the Eastern District of New York.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on December 16, 1981. A timely Petition for Rehearing or Rehearing In Banc, reprinted as Appendix B hereto, was denied on February 3, 1982, and this Petition for Writ of Certiorari was filed within the time prescribed by the rules, as extended by Order of Associate Justice Marshall on March 25, 1982. This court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law.

21 U.S.C. § 841. Prohibited acts

> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

21 U.S.C. § 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

28 U.S.C. § 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by

motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

STATEMENT OF THE CASE

On May 16, 1979, an indictment was returned charging Joel L. Merling, petitioner herein, and eleven other defendants with conspiracy to violate 21 U.S.C. § 841(a)(1) in the period between July 1974 and December 1976. On July 20, 1979, petitioner suffered a massive dual-wall myocardial infarction and was hospitalized in St. Mary's Hospital, Montreal, Canada. After an examination at government request by Dr. Leslie B. Cooperman corroborated the medical conclusions of petitioner's Montreal physicians, his case was severed from the other defendants.

In October 1979, against his doctors' orders and unaccompanied by an attorney, petitioner submitted himself to two days of intensive interrogation by representatives of the government. Not long after this interrogation, petitioner, on November 4, 1979, was readmitted to St. Mary's Hospital suffering acute coronary insufficiency. In response to a call by his attorney, petitioner journeyed to New York on November 15, 1979, the day after his release from the hospital, in order to resolve his criminal charges.

During the entire period after his first heart attack, petitioner had been under considerable stress from his fear that he was going to die and his anguish at having been indicted. To deal with his stress and physical infirmities, he was required to take medication which made it difficult for him to focus on problems and think clearly. Since July 1979, he had been taking medication which by October had been increased in dosage to the following: Inderal, 60 milligrams four times-a-day; Isordil, 20 milligrams every four hours; Serax, 30 milligrams three

times-a-day; Dalmane, 30 milligrams at bedtime; and nitroglycerin. Alarmed by his precarious state of health, perturbed by his criminal indictment, upset by the dire predictions of his attorney and impaired in judgment by his heavy medication, petitioner agreed to plead guilty on November 19, 1980.

After a colloquy at the plea hearing concerning petitioner's desire to demonstrate his minimal participation in the alleged conspiracy, the trial court placed him under oath and outlined the maximum term, the requisite constitutional rights pursuant to Rule 11(c), and the indictment. Petitioner assented to the various questions and statements put to him by the court and his attorney. At the end of the questioning, the court asked petitioner what role he had played in the conspiracy and petitioner explained that he had sold mannite in 1975 on one occasion and had nothing further to do with mannite except for attempting to collect his money. He also explained that he thought that the mannite would be unlawful under American law, but that his only concern was that the buyer pay him for the mannite. Thereafter, the court conducted an extensive interrogation attempting unsuccessfully to demonstrate that petitioner had also sold quinine, as had been alleged; nonetheless, the court found that there was a factual basis for the plea and accepted it.

The court then suggested that plaintiff see a probation officer immediately, but his attorney, explaining that petitioner had just had an angiogram and had a hematoma running the entire length of his leg, asked that he be permitted to come back the following week. Although suggesting that petitioner should have preferred to spend another half hour and get it over with, the court permitted him to go back to Canada and return in a week. During the compilation of the presentence report, petitioner's medical condition was probed and on February 1, 1980, he was sentenced to a term of five years to be served in a medical facility at Lexington, Kentucky.

By Memorandum of Decision and Order of April 22, 1981, the court denied petitioner's Motion to Withdraw

Guilty Plea and Vacate Sentence without an evidentiary hearing. In his Memorandum, the judge stated that the trial over which he had presided[1] revealed that petitioner had started shipping mannite to the United States in July 1974, and in the period June to December 1976, he had exported thousands of pounds of mannite into the United States and that these shipments included dufflebags containing quinine. The Memorandum related that petitioner entered a plea of guilty on November 19, 1979, appeared on February 1, 1980, for sentencing and testified in accordance with a type-written statement entitled, "The Facts in This Matter." Thereupon, the court flatly stated without explanation that the "record clearly establishes a factual basis for the plea as required under Rule 11(f)" and that the nature of the conspiracy charge was explained as required under Rule 11(c)(1).

The only issue presented that warranted discussion, according to the court, was whether or not the plea was knowingly and voluntarily made. After a discussion of only three of the affidavits submitted in support of petitioner's motion, the government cardiologist's letter and petitioner's background, the court concluded that if petitioner had taken the medication prior to the plea, he should have known its effect and revealed it to the court and his lawyer. The court felt that petitioner was fully aware of the nature of the plea proceedings on November 19, 1979, and that he had knowingly and voluntarily offered the plea of guilty; furthermore, petitioner did not appear to the court substantially different emotionally on February 1, 1980, than he did on November 19, 1979. The court found that the issue petitioner raised was "transparently false" and denied his motion.

On December 16, 1981, the Court of Appeals for the Second Circuit affirmed the District Court's denial of petitioner's Motion to Withdraw His Plea of Guilty without a

---

[1]The convictions in this case were affirmed in *United States* v. *Perry*, 643 F.2d 38 (2nd Cir.), *cert. denied* (1981).

hearing and agreed with the District Court that petitioner's claim was "palpably false." The Court of Appeals relied on the following factors to overcome the need for a hearing which would ordinarily be granted: a) there was an extensive colloquy at the plea hearing and the sentence hearing during which, according to the District Court, petitioner appeared alert and responsive; b) that only after a lapse of one year from his guilty plea did petitioner bring his mental impairment to the attention of the court despite the fact that "as a former student of pharmacy who was licensed to fill prescriptions under supervision, [he] could be expected to know the effect of the medication he was allegedly taking;" c) the District Court found nothing in the record, with the exception of petitioner's own affidavit, constituting evidence of his alleged impairment. Thereupon the court affirmed.

ARGUMENT

I. BECAUSE PETITIONER WAS SO MENTALLY IMPAIRED THAT HE WAS INCAPABLE OF UNDERSTANDING THE CHARGES, THE GUILTY PLEA SHOULD HAVE BEEN WITHDRAWN OR, IN THE ALTERNATIVE, A HEARING SHOULD HAVE BEEN HELD ON THIS ISSUE.

It is generally agreed that for a guilty plea to be valid it must represent a voluntary and intelligent choice among the alternative courses of action open to the defendant. *North Carolina* v. *Alford*, 400 U.S. 25 (1970). Under F.R.Crim.P. 11, the entry of the plea must be an intelligent act made with sufficient awareness of the relevant circumstances and its likely consequences. *McMann* v. *Richardson*, 397 U.S. 759 (1970); *Brady* v. *United States*, 397, U.S. 742, 749 (1970) and *McCarthy* v. *United States*, 394 U.S. 459, 466 (1969).

The purpose of requiring a determination that the defendant understands the law in relation to the facts is to "protect a defendant who is in a position of pleading voluntarily with an understanding of the nature of the

charge but without realizing that his conduct does not actually fall within the charge," F.R.Crim.P. 11, Notes of Advisory Committee on Criminal Rules. This determination is implemented by Rule 11(f) which states, "The Court should not enter a judgment upon such a plea without making such inquiry as shall satisfy it that there is a factual basis for the plea." Finally, to facilitate any post-plea review, Rule 11(g) mandates in pertinent part that "a verbatim record of the proceedings at which the defendant enters a plea shall be made and [shall include] the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of the guilty plea."

The generally accepted standard for determining competency was enunciated in *Dusky* v. *United States*, 362 402 (1960). According to *Dusky* a defendant must have the ability to consult with his attorney with a reasonable degree of rational understanding and "have a rational and factual understanding of the proceedings against him. It is not sufficient that a defendant is oriented as to time and place and has some recollection of events." *Id.*, 362 U.S. at 402.

One who lacked the capacity to have entered an intelligent plea of guilty may withdraw his plea pursuant to Rule 32(d) or collaterally attack his conviction and sentence pursuant to 28 U.S.C. § 2255. *United States* v. *Masthers*, 539 F.2d 721, 726 (D.C. Cir. 1976). *See, Sanders* v. *United States*, 373 U.S. 1 1963); *United States* v. *McGirr*, 434 F.2d 844 (4th Cir. 1970); and *United States* v. *Joslin*, 434 F.2d 526 (D.C. Cir. 1970).[2] Such a petitioner must be

[2]The recent case of *United States* v. *Frady*, U.S. Sup. Ct. No. 80-1595, 31 CrL 3013, decided April 5, 1982, in no way diminishes petitioner's right to collateral relief in this case since there is both cause excusing any procedural default in failing to exercise a direct appeal and actual prejudice resulting from this error. It is manifest that petitioner's impaired mental acuity, as is more fully stated in the text, caused him to be unable to fully explain this matter to the court and his attorney such that a direct appeal could have been exercised; it also caused him actual prejudice since he was unable to fully comprehend the proceedings or the nature of the charges against him.

offered an opportunity to present evidence at a hearing unless the motion, files and records of the case conclusively show that the prisoner is entitled to no relief. 28 U.S.C. § 2255.

Ordinarily, and in the instant case, "the question of mental competency to stand trial is not one which comes within the excusatory provision of 28 U.S.C. § 2255, making unnecessary a hearing." *Nelms* v. *United States*, 318 F.2d 510 (4th Cir. 1963). Thus, even if the proceedings appear regular on their face, such regularity cannot conclusively show that a petitioner's claim is without merit for the facts upon which such claim is based are usually outside the record. *Sanders* v. *United States*, *supra*, 373 U.S. at 19-20; *cf.*, *United States* v. *Malcolm*, 432 F.2d 809 (2d Cir. 1970). Not only were petitioner's plea proceedings not regular on their face, but the surrounding circumstances clearly pointed to a likelihood that he was not at that time fully competent to understand the nature of the proceedings and the charges against him.

Shortly after petitioner's arraignment on this indictment, he suffered a severe heart attack which resulted in his hospitalization and later caused the court to sever his case from that of the other defendants. The severance was based on the findings of a government-appointed doctor, Dr. Cooperman, who confirmed to the court petitioner's physical problems. Furthermore, on November 4, 1979, shortly after petitioner's grueling interrogation, he was readmitted to St. Mary's Hospital suffering acute coronary insufficiency.

From July 1979 and continuing up to the time of his sentence, petitioner had been taking medication for his heart condition such that his regular dosage at the time of his plea was: Inderal, 60 milligrams four times-a-day; Isordil, 20 milligrams every four hours; Serax, 30 milligrams three times-a-day to alternate with Valium, 10 milligrams three times-a-day; Dalmane, 30 milligrams at bedtime; and nitroglycerine. In addition to taking the 120 milligrams of Inderal prescribed for his morning dosage, petitioner took an additional dose of 30 milligrams of

Serax immediately before leaving for the courthouse on the day of the plea and, while at the courthouse about a half hour before the plea, he took 10 milligrams of Valium. At the plea hearing the court, apparently noticing petitioner's discomfort, twice suggested that he remain seated during the plea. During the plea proceedings, petitioner exhibited on the record an inability to understand the critical element of knowledge when the court asked him if he did what he was charged with having done.

After the plea had been taken, the court was informed that petitioner had just had an angiogram, his entire leg had a hematoma and part of his artery was open. Petitioner explained to the court he was very fatigued, tired and depressed and was unable to see a probation officer that day. Despite these clear indications of petitioner's physical problems, there was no inquiry by the court into what medication he was taking at that time.

Finally, by the time of the sentencing proceeding, the court had been apprised of petitioner's previous hospitalization for psychiatric problems and that he had been on medication from July 1979 to February 1980. Despite these opportunities to ascertain petitioner's mental condition, the court proceeded with the imposition of sentence. Accordingly, it seems clear that despite the court's undoubted perspicacity, its observations of petitioner at the plea and sentence hearings cannot be found sufficient, in the face of petitioner's illness, his uncontradicted heavy use of mind-impairing medications, and his psychiatric history, to supply that conclusive refutation of lack of capacity required by *Sanders* v. *United States, supra.*

Although the court brushed aside all evidence presented in petitioner's motion except for his own affidavit, petitioner suggests that the following uncontroverted record facts persuasively support the fact that he was mentally impaired at the time of his plea. These uncontroverted record facts are: petitioner's affidavit that he was taking massive amounts of medication;

Cheryl Cossman's two affidavits that he was taking Inderal, Isordil, Valium, Serax and Dalmane in large amounts in November of 1979 and exhibited symptoms of forgetfulness, inappropriate responses, change of behavior and a deteriorated level of comprehension; and the Petrilli, Segal and Gunsberg affidavits which indicated that his comprehension level had deteriorated, he frequently was not coherent and was uncharacteristically forgetful and indecisive. In addition, petitioner presented numerous prescriptions for benzodiazepines and Inderal, which had been filled from Summer 1979 through Spring 1980. Indeed, Dr. Cooperman, who was hired by the government to examine petitioner with respect to his coronary deficiency, pointed out to the court that before the plea petitioner was taking medication. Thus, the lay affidavits and supporting documents conclusively show massive drug ingestion and significantly diminished mental capacity during the time of petitioner's plea.

Dr. Rebecca Anderson of George Washington University and Dr. Nelson Hendler of the Mensana Clinic and Johns Hopkins University fully explain the insidious, mind-dulling capacity of benzodiazepines and Inderal, as well as the likely effect of ingestion of those drugs in the amounts taken by petitioner. As is more fully set out in their affidavits, benzodiazepines, particularly Serax and Valium, are likely to produce a variety of effects, including lightheadedness, lassitude, impairment of mental functions, disorganization of thought and other types of memory loss and cognitive impairment that are associated with alcohol-induced impairment. However, the overt symptoms of alcohol-induced impairment—slurred speech, for example—are frequently not apparent with benzodiazepine-induced impairment. Noting that the typical effects of propranolol (Inderal) include dizziness, drowsiness, lassitude, headache, and short-term memory loss, Dr. Hendler states that these symptoms, especially the memory loss, appear more common after prolonged high-dose propranolol therapy. After pointing out that his recent study indicates that approximately 70 percent of the patients taking benzodiazepines suffer some form of

intellectual impairment, such as memory loss and reduction of I.Q., he notes that Inderal also produces depression, as well as cognitive impairment and mental confusion.

It is possible that where there is no reason to suspect the defendant is not capable of entering a voluntary and understanding plea, no inquiry by the trial court may be necessary; however, where "the Court is on notice that the defendant's mental faculties may be impaired, the Court has a responsibility to delve further to determine the defendant's comprehension." *Osborne* v. *Thompson*, 481 F. Supp. 162 (M.D. Tenn., 1979). Here the evidence available to the court and the prosecutor from the November 19th plea hearing and the previous hearing on the severance constituted that "failure to observe the unfurled flags signalling danger and possible or probable infirmity in the defendant's capacity or volition or both," that was found to require withdrawal of the guilty plea in *United States* v. *Kincaid*, 362 F.2d 939, 941 (4th Cir. 1966).

The narcotics which the court in *Manley* v. *United States*, 396 F.2d 699 (5th Cir. 1968) found so significantly to lessen the defendant's capacity to make an important decision that it withdrew the plea, according to the study by Dr. Hendler, have markedly less impact on cognitive impairment than the benzodiazepines[3] taken by petitioner. "A Comparison of Cognitive Impairment Due to Benzodiazepines and to Narcotics", Nelson Hendler,

[3]It verges on irony to compare the flap caused by the disclosure that Associate Justice Rehnquist had reportedly taken Placidyl, a comparatively benign sleeping pill, for relief of a chronic back problem to the cavalier treatment given the evidence that petitioner had been taking large amounts of benzodiazepines and propranolol over an extended period. *See*, "Supreme Court's Cloak of Secrecy Becomes Issue in Rehnquist Illness," *National Law Journal*, p. 3, January 18, 1982. Naturally, Associate Justice Rehnquist is more newsworthy than petitioner and his decisions—which should ideally be unaffected by any mind-impairing drug ingestion—will affect many more persons, yet petitioner values highly his right to have entered his plea voluntarily and submits that his claims should at least have received a hearing, especially in view of the recent research in this field.

M.S., M.D., *et al.*, *American Journal of Psychiatry*, 137:7, July 1980. Since the inquiry would have elicited petitioner's likely cognitive impairment, the court could have determined at the time of the plea the state of "certainty as to a lack of any mental effects of drugs upon a defendant" that was found to be a matter of particular judicial solicitude in *Hayes* v. *United States*, 305 F.2d 540, 543 (8th Cir. 1962).

The Court of Appeals placed some reliance on the fact that the first official report to the court of petitioner's mental impairment occurred approximately ten months after his sentence and that as "a former student of pharmacy" petitioner should have known the effects of the medication he was taking. This reliance is misplaced. Recent studies have shown that these drugs have a greater mind-dulling effect than narcotics. Furthermore, as Dr. Anderson stated in her affidavit:

> The loss in function is subtle, progressive and not fully appreciated by the patient. In this same study, the drug takers were asked to make their own ratings. Interestingly, during the first week of dosing they acknowledged their impairment, but by the second and third weeks, they failed to recognize their impairment, although their performance on the mental and manual tests was, if anything, worse.

The ground-breaking study explaining this was first published in July 1980 in the *American Journal of Psychiatry* by Dr. Hendler. To hold petitioner, a student pharmacist who could not even perform the mechanical task of filling prescriptions without supervision, to a standard of knowledge comparable to highly trained psychiatrists and pharmacologists and to deny his motion on that basis is inequitable. Moreover, if the affidavits of Drs. Hendler and Anderson, both well-respected experts in their field, have scientific merit—and there has been no contention to the contrary—the effect of the drugs would be to deprive petitioner of his ability to define the source of his impaired mental acuity. As soon

as the source of the problem was perceived, petitioner's motion was filed. Thus, the purported "record evidence" supporting the facial regularity of the proceeding below is hardly sufficient to satisfy a moderately critical reviewer, much less to meet the conclusive refutation standard of *Sanders*.

Thus, the affidavits and supporting documents conclusively show massive drug ingestion and petitioner's significantly diminished mental capacity in November 1979. The affidavits of Drs. Hendler and Anderson show the effects of such drug ingestion would be mental impairment, which would be undetected by an observer in the position of the trial court or even petitioner and his counsel.

The trial court's ruling not only fails to meet the standards of review set forth by this Court in *Sanders* v. *United States*, *supra*, but the Second Circuit's affirmance of that ruling is in direct conflict with *United States* v. *Masthers*, *supra*.

In *Masthers*, Chief Judge Bazelon of the District of Columbia Circuit, writing for the majority, stated that in the case of a retarded defendant:

> Counsel's initial failure to recognize appellant's retardation and appellant's apparent acquiescence must be examined in the light of available research. For example, studies could be introduced at a proper hearing, subject to examination and cross-examination, indicating that the mentally retarded often demonstrate an exaggerated suggestibility and need to cooperate, and that retardation frequently goes undetected.
>
> Nor can the court's reliance on its personal observations of appellant be determinative. Decisions of the Supreme Court and the various courts of appeals clearly indicate that the trial court's observation of a defendant's apparent rationality and comprehension is an insufficient basis for denying a hearing on a § 2255 motion raising the issue of competency. The impropriety of reliance

> on personal observation is highlighted in the case of a retarded defendant. (Footnotes omitted.) 539 F.2d at 727-728.

Here, there was ample evidence both lay and expert, to demonstrate *prima facie* that petitioner was mentally incapable of entering a plea of guilty. Even were there not, the denial of petitioner's motion without a hearing, particularly in this fast-developing area of scientific research into the effect of benzodiazepines and propranolol, was clearly in conflict with the decision of the District of Columbia Circuit in *United States* v. *Masthers*.

Accordingly, petitioner submits that this conflict must be resolved by this Court and petitioner's motion to withdraw his guilty plea must either be granted or a hearing must be granted thereon.

II. THE RECORD FAILS TO ESTABLISH THAT PETITIONER UNDERSTOOD THE NATURE OF THE CHARGES.

Despite the highly complex nature of the conspiracy alleged herein, the court did not provide petitioner with due process of law as required under the Constitution and F.R.Crim.P. 11(c)(1) by its failure to explain the principles of conspiracy adequately and to demonstrate on the record that petitioner possessed an adequate understanding of the nature of the charges against him.

The court explained conspiracy to petitioner at the plea proceedings as follows: "The conspiracy is that you sold mannite knowing it was going to be mixed with heroin and that you understood it was going to be used for an unlawful purpose." At no time other than as quoted above did the court explain that the essence of the crime of conspiracy is the *agreement* and not the commission of the objective substantive crime. *See, e.g., United States* v. *Perry*, 643 F.2d 38 (2d Cir. 1981), *cert. denied*, 50 U.S.L.W. 3229 (Oct. 6, 1981).

It is the obligation of the trial court to explain the nature of the charges to the person entering the plea. *Irizarry* v. *United States*, 508 F.2d, 960 (2d Cir. 1974). No

such explanation was given here nor was one pointed to by the government. In lieu of an explanation by the court, the Court of Appeals seems to have accepted petitioner's statement that he understood the charge. This, of course, is insufficient under *McCarthy* v. *United States*, *supra*, and *United States* v. *Wetterlin*, 583 F.2d 346 (7th Cir. 1978). Since an explanation of conspiracy was especially needed in a complex and sophisticated conspiracy charge as is found here and such explanation was completely omitted, there is no basis in the record for inferring that petitioner understood that proof of the agreement was an essential element of 21 U.S.C. § 846, the offense to which he pled guilty.

Although any of the above-stated reasons should require the withdrawal of his guilty plea, taken together, they compel that conclusion. When compounded by petitioner's mentally impaired state during plea proceedings, the necessity of permitting petitioner to withdraw his guilty plea as having been made without understanding cannot be denied.

The failure to accord petitioner due process in assuring he understood the nature of the charges against him is directly in conflict with F.R.Crim.P. 11(c)(1) and *United States* v. *Wetterlin*, *supra*; this conflict should be resolved by this Court.

III. THERE WAS NO FACTUAL BASIS DEVELOPED ON THE RECORD TO JUSTIFY THE ACCEPTANCE OF PETITIONER'S GUILTY PLEA.

This Court has held that a defendant is entitled to plead anew if the trial court accepts his guilty plea without fully adhering to the procedures specified in Rule 11. *McCarthy* v. *United States*, *supra*, 394 U.S. at 466. In order to comply with Rule 11, the court must not only inquire into a defendant's understanding of the nature of the charges and consequences of the plea, but must also "develop, on the record, the factual basis for the plea as, for example, by having the accused describe the conduct that gave rise to the charge." *Santobello* v. *New York*, 404

U.S. 257 (1971). The purpose of this procedure is that the court must determine that the conduct to which the defendant admits constitutes the offense charged in the indictment.[4] *McCarthy* v. *United States, supra*, 394 U.S. at 467.

The Court of Appeals' opinion states that "... as Judge Mishler noted before he began his Rule 11 inquiry, the evidence introduced in the trial of appellant's severed codefendents alone provided a factual basis for the plea,

[4]The indictment, at least as it relates to petitioner alleges actions that are remarkably close to those charged in *United States* v. *Falcone*, 311 U.S. 205 (1940). In *Falcone*, the defendant had sold materials (sugar, basically the same as mannite) which were essential to the operation of an illegal distillery and which he knew were to be used illegally. The Court found that "merely because [the defendant] did not forego [sic] a normally lawful activity of the fruits of which he knew others were making unlawful use," he could not be found guilty of conspiracy; it must be shown that he knew of the conspiracy as well as the ultimate destination of the goods.

A mail order house, which had sold huge amounts of morphine to a doctor over a period of years, attempted to avail itself of the *Falcone* defense in *Direct Sales* v. *United States*, 319 U.S. 703 (1942). The Court rejected that defense because in *Direct Sales* the morphine was not an article of free commerce and the mail order house had a prolonged business relationship with the purchaser. The Court indicated that a single sale, even of a restricted commodity, would not be sufficient to show intent. Here, petitioner admitted only to one sale of an article of free commerce; even had there been multiple sales of mannite and quinine, that fact pattern seems closer to *Falcone* than *District Sales*.

It should be noted that many states, under the guidance of the United States Department of Justice, have passed "paraphernalia" laws which prohibit the sale of many drug-related items, including diluents. *See, e.g.*, Art. 27 Md. Code § 287A, which was upheld in *Mid-Atlantic Accessory Trade Association* v. *State of Maryland*, D.C. No. H80-1324, D.C. Md., Nov. 13, 1980, Harvey, J. Although we do not suggest a doctrine of state preemption of federal statutes, the laws do demonstrate a belief by the Department and the states that trade in paraphernalia known to be intended for illegal drug use had not been theretofore prohibited. Accordingly, even if in proof of this indictment the government could demonstrate a series of sales of mannite and quinine along with petitioner's prior knowledge that the commodities were to be used for diluting heroin, a substantial argument could be made for dismissal for failure to state an offense. Whatever conclusion is drawn from this analysis, the similarity of petitioner's case to *Falcone* calls for a more careful explanation of the charges. *See*, Argument II, *supra*.

even though that trial had not focused on appellant." This factual predicate for the opinion is flatly contradicted by Judge Mishler's own words in accepting the plea wherein he stated, "The trial focused on others in the indictment and not on Merling. *All I got at the trial* were Mr. Merling's participation, Mr. Para had trucked mannite and quinine into Montreal." (Emphasis supplied). Unless one is prepared to conclude that Judge Mishler did not mean what he said, petitioner submits that the trial record, relied on in the opinion, supplies no part of any factual predicate for petitioner's plea.

The Court of Appeals also suggested that some factual basis could be found in petitioner's statements at the sentencing hearing. Although no factual basis to support the plea has been pointed to, a review of the sentencing hearing shows that the inadequate factual basis found in the plea hearing is further eroded. At the sentencing hearing petitioner denied all sales of quinine, admitted only one sale of mannite and disavowed knowledge of any conspiracy; that disavowal was supported by his codefendant who testified that he had not told petitioner what the mannite was to be used for.

Although the above narration should be sufficient to require his plea to be withdrawn, petitioner went further. In his letter to the court, he stated that he had *no intent to conspire* to distribute heroin and that he first learned of some of the specifics of the venture in August 1976 and did nothing thereafter to assist that venture. Even more conclusive of the lack of factual basis for the plea is petitioner's attorney's statement that after all was considered, "He's [petitioner] still *not culpable*." The opinion describes these clear denials of guilt as statements "designed to minimize his culpability" which in some unstated way added to the factual basis for the plea. In fact, these statements should have been evaluated at the time of the sentencing proceeding, *see, F.R.Crim.P.* 11(f), and caused the withdrawal of the plea, *see, Lamagna* v. *United States*, 646 F.2d 775 (2d Cir. 1981); *Rizzo* v. *United States*, 516 F.2d 789 (2d Cir. 1975) and *Irizarry* v. *United States, supra.*

Accordingly, since there was no factual basis for the plea on the record, either at the time of the plea or thereafter, and since both the record of the plea proceeding and subsequently developed facts amounted more to a protestation of innocence than an expression of guilt, the court should have delayed accepting the plea until it was clearly established that petitioner understood the elements of the crime and was willing to enter an unequivocal admission of guilt. Since Rule 11 was not complied with, petitioner's plea of guilt should have been withdrawn for lack of an adequate factual basis.

The failure to withdraw this plea is clearly contrary to this Court's position in *McCarthy* v. *United States, supra*, as well as the Second Circuit's view in *Rizzo* v. *United States, supra*, and certiorari should be granted to rectify this matter.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that this Court should issue a writ of certiorari to the Court of Appeals for the Second Circuit to review its decision.

Respectfully submitted,

BRIAN W. SHAUGHNESSY,
Attorney for Joel L. Merling
1133 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 293-9390

Appendix

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixteenth day of December one thousand nine hundred and eighty-one.

Present:
Hon. Henry J. Friendly,
Hon. James L. Oakes,
Hon. Lawrence W. Pierce,
Circuit Judges.

JOEL L. MERLING,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

ORDER

Joel Merling appeals from a judgment of the United States District Court for the Eastern District of New York, Jacob Mishler, Judge, denying his motion pursuant to Fed. R. Crim. P. 32 and 28 U.S.C. § 2255 to withdraw his plea of guilty to a narcotic conspiracy charge, 21 U.S.C. § 846, and vacate his sentence. The conspiracy in which Merling was involved is described in *United States* v. *Perry*, 643 F.2d 38 (2d Cir. 1981), *cert. denied*, 50 U.S.L.W. 3229 (U.S. Oct. 6, 1981). Finding no merit in appellant's claims, we affirm.

Appellant's first contention is that he should have been allowed either to withdraw his plea because he was mentally impaired at the time of the plea as a result of

medication he was taking to alleviate a heart condition, or at least to present evidence of his alleged impairment at a hearing. Judge Mishler, finding appellant's claim "transparently false," denied the motion without a hearing. Under 28 U.S.C. § 2255, a hearing is required "unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." As stated in *United States* v. *Malcolm*, 432 F.2d 809, 812 (2d Cir. 1970), "[a] hearing is not required, therefore, where the allegations are insufficient in law, undisputed, immaterial, vague, conclusory, palpably false or patently frivolous."

Keeping in mind that "ordinarily a hearing will be required" with respect to claims of mental incompetence at the time of trial or plea, Wright, *Federal Practice & Procedure* § 599 at 629 (1969), we agree with the court below that the claim of incompetency was palpably false and the denial of the motion without a hearing therefore proper. Appellant pleaded guilty on November 19, 1979. The court accepted the plea after an extensive colloquy during which neither appellant nor his experienced attorney gave any indication that appellant was impaired. Nor did appellant raise the issue before or at the sentencing hearing that took place on February 1, 1980. Again the court engaged in extensive questioning and appellant appeared alert and responsive although he claims to have been taking the same medication as at the time of the plea. Indeed he submitted at the sentencing hearing, and testified in accordance with, documents he prepared bearing the titles, "The Facts In this Matter: Joel Merling's Involvement," and "Joel Merling: His Life and Other Pertinent Facts," which in and of themselves demonstrated his intelligence and mental competence. Only on December 21, 1980 did appellant file the instant motion.

This is not a case like *Sanders* v. *United States*, 373 U.S. 1, 20 (1963) in which a hearing was required because "[w]hether or not petitioner was under the influence of narcotics [at the time of the plea] would not necessarily have been apparent to the trial judge. Petitioner appeared

before him without counsel and but briefly." Here appellant appeared with counsel and, especially considering the sentencing hearing, far from briefly. The case is in fact closer to our own *United States* v. *Malcolm*, 432 F.2d at 813, in which we held that while the regularity of the proceedings in that case did not conclusively show the claim to be meritless, other evidence in the record did provide conclusive refutation. Here, as Judge Mishler noted, the facial regularity of the proceedings is not only more significant but there is record evidence that refutes the claim. Appellant did not advise the court or his attorney of his alleged incompetence until well after the date of sentencing. In addition, appellant, as a former student of pharmacy who was licensed to fill prescriptions under supervision, could be expected to know the effect of the medication he was allegedly taking; his failure to reveal his alleged impairment until more than a year after the plea is accordingly even more telling.

Moreover, with the exception of appellant's own affidavit, of December 11, 1980, nothing in the motion papers or the record constitutes evidence of Merling's alleged impairment. Accompanying pharmacological and psychiatric experts' affidavits hypothetically refer to the possible or probable effects on some persons who might take the drugs in the dosages appellant claims he did. The affidavits of appellant's fiancee, other acquaintances, and sister state that appellant was upset, in deteriorated condition, and under medication following his indictment and heart attack, but provide no specific or positive evidence that he was mentally incompetent at the time of his plea. In short, we agree with Judge Mishler that appellant's claim is palpably false.

Appellant's second and third contentions are that the court violated Fed. R. Crim. P. 11 by failing to establish that appellant understood the nature of the charge against him and by failing to develop a factual basis on the record for the plea. We believe that the transcript of the November 19 proceedings belies these claims. The court read the indictment to appellant and explained that appellant was guilty only if he knowingly participated in

a conspiracy with respect to distribution of narcotics. He was informed that selling mannite was a crime only if he intended the sales to be part of an overall conspiracy to supply diluents to drug dealers. Appellant not only stated that he understood the charges, but also admitted his guilt to those charges and read a statement about his involvement into the record. Appellant's statements at the sentencing hearing, while designed to minimize his culpability, also added to the factual basis for the plea. And, as Judge Mishler noted before he began his rule 11 inquiry, the evidence introduced in the trial of appellant's severed co-defendants alone provided a factual basis for the plea, even though that trial had not focused on appellant. Our review of the record convinces us that appellant understood the charges against him and that there was a factual basis for his plea of guilty, even having in mind the differences in underlying legal theory among the members of the panel in *United States* v. *Perry, supra.*

Appellant's final argument is that his sentence should be vacated because of false statements in the presentence report. In light of Judge Mishler's express statement during sentencing that he was not taking into consideration those parts of the presentence report that had not been corroborated, we find no merit to this point.

Judgment affirmed.

/S/
Henry J. Friendly

/S/
James L. Oakes

/S/
Lawrence W. Pierce

Circuit Judges

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the third day of February, one thousand nine hundred and eighty-two.

JOEL L. MERLING,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the petitioner-appellant, Joel L. Merling.

Upon consideration by the panel that heard the appeal, it is ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

/S/
A. Daniel Fusaro

Clerk

by Francis X. Gudhart
Chief Deputy Clerk